No. 14897

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

G. de Bretteville and Treasure Company, a corporation,

Appellants,

vs.

Walter B. Scoville and The Adamant Company, a corporation,

Appellees.

Reply Brief of Appellants G. de Bretteville and Treasure Company.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Textbook

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I.

Appellees' Reply Brief Does Not Answer the Argument That the Judgment Below Awards Judgment to a Party Who Has Not Asserted Any Cause of Action Therefor.

In the Opening Brief of appellants de Bretteville and Treasure Company the argument was made that appellee Adamant Company has not asserted any cause of action in this lawsuit to support the judgment rendered in its favor.

At pages 3 and 4 of the Appellees' Reply Brief, appellees attempt to answer this argument by referring to various irrelevancies.

Appellees first refer to paragraph II of the second cause of action of their Second Amended and Supplemental Complaint [Tr. pp. 4-5], citing the allegations therein set forth as an admission that advances totaling $13,000 went into a fund for the completion of the well. It is appellants' contention that the stipulation of counsel quoted in this paragraph (which was entered into in the lawsuit before Judge Vickers in the state court) was not intended to be and is not an *admission*, its sole purpose having been to delineate the issues before the court in that particular case. Furthermore, it should be noted that the language of the stipulation makes no reference whatever to the *source* of the funds then under discussion and therefore lends no support to the proposition that $13,000 was advanced by *both* appellee Scoville *and* appellee Adamant Company under an agreement that repayment would be made to *them*.

Appellees next refer to the so-called "Parker Audit" which was introduced as their exhibit. Obviously appellees cannot rely upon their own evidence to fill in gaps in their pleadings, even if the "Parker Audit" could be construed to stand for what they read into it. The "Parker Audit" was *not* the basis of the determination of any issues in the accounting before the Special Master inasmuch as the "Moore Audit" was used for this purpose [Tr. p. 38].

The third reference made by appellees is to the *original* complaint which they filed in this lawsuit and to the *original* answer of appellants. Both of these pleadings were superseded and neither can be leaned upon in this appeal.

The law is clear as to the effect of an amended pleading, when filed, on the original pleading. In 21 Cal. Jur. 213 it is stated in Sec. 146:

> "An amended pleading which is a valid subsisting pleading and entitled to recognition as such, supersedes the original, even when the amendment is made to conform to the proofs. While the original pleading is still a part of the judgment-roll, it performs no function as a pleading; it cannot be looked to for the issues to be tried; and is not admissible in evidence for or against the one filing it. *The averments of the original cannot be used to disprove those of the amendment, for otherwise one would reap no benefit from his amendment;* and to allow the introduction of the original generally as evidence in favor of the party filing it, would, it has been said, permit one to manufacture testimony in his own behalf." (Emphasis added.)

In *Grubbs v. Smith,* 86 F. 2d 275 (C. C. A. 6, 1936), cert. den. 57 S. Ct. 437, it was held that an amended and substituted petition supersedes prior pleadings, irrespective of the plaintiff's intention. The court said at page 275 of 86 F. 2d:

> "A preliminary question arises as to whether the action in the court below was pending upon all of the pleadings named or upon the amended and substituted petition only. That it was the intention of the plaintiff that the amended and substituted petition should supersede the petition and the amended petition appears from the amended and substituted petition itself. It contains 107 typewritten pages, recites that it is filed in compliance with the order of the court requiring the plaintiff to combine his petition and amended petition in one amended and substituted petition, and, by reference, incorporates all of the ex-

> hibits theretofore filed in the action with the petition and the amended petition the same as if copied in full in the amended and substituted petition. But whatever the plaintiff's intention, as a matter of law the amended and substituted petition supersedes the prior pleadings in the case. Ferguson, Ex'r. v. Meredith, 1 Wall. (68 U. S.) 25, 17 L. Ed. 604; Brown Sheet Iron, etc., Co. v. Maple Leaf etc. Co. (C. C. A. 8), 68 F. (2) 787; Aetna Life Ins. Co. v. Phillips (C. C. A. 10), 69 F. (2) 901; Bedell v. Baltimore & O. R. Co. (D. C. E. D. Ohio), 245 F. 788."

In passing, it should be emphasized that appellees attempted to incorporate by reference all of the allegations of their original complaint in their Second Amended and Supplemental Complaint, but the trial judge expressly ruled that this could not be done and ordered the incorporating clause stricken from the pleading, as is evidenced by Clerk's marginal notation on the instrument [Tr. p. 3].

Finally, appellees refer to a particular finding of Judge Vickers in the earlier trial in the state court which had been placed in evidence by appellants de Bretteville and Treasure Company as part of the entire record of the Superior Court case [Deft. Ex. "Q"]. This finding, as quoted on page 4 of Appellees' Reply Brief, is by its very language merely a finding that no finding is made. It offers no support for appellees' argument that their Second Amended and Supplemental Complaint contains allegations in its second cause of action which support the judgment in favor of appellee Adamant Company.

II.

Appellees' Argument That Appellants Have Deformed the Record on This Appeal Is an Unwarranted and Baseless Accusation.

At page 5 of Appellees' Reply Brief appellees have contended that the Transcript of Record designated by these appellants does not reflect a true report of the proceedings at the trial.

On the pretense that appellants de Bretteville and Treasure Company have unfairly omitted pertinent testimony by inserting asterisks at page 199 of the Transcript, appellees have included in their brief, *in narrative form,* testimony which they state was given by appellant de Bretteville.

Appellants de Bretteville and Treasure Company have not agreed to the *narrative form* of the testimony as set forth in Appellees' Reply Brief, and in defense of the serious charge which is implied in this particular argument, these appellants state that the record on this appeal was designated in good faith and in conformity with Rule 75 of the Federal Rules of Civil Procedure. Appellants submit that appellees should not be heard to complain to the completeness of the record on appeal, inasmuch as appellees had an opportunity to designate any portions of the Reporter's Transcript which they chose to include and failed to take advantage of their opportunity to do so.

In *Associated Indemnity Corporation v. Manning, et al.,* 107 F. 2d 362 (1939), this Court held that the trial court's findings are subject to attack on appeal as against an appellee's insistence that all of the evidence is not in the record where the appellant had complied with the rule in effect when the appeal was taken and where the appel-

lees had not called attention to any material evidence omitted from the printed record.

In *William Howard Hay Foundation v. Safety Harbor Sanatorium,* 145 F. 2d 661 (C. C. A. 5, 1944) (cert. den. 324 U. S. 877, 89 L. Ed. 1429, 65 S. Ct. 1024), plaintiff below had filed his designation of the record in connection with his appeal. The defendant below had neither filed his own designation nor objected to the one which plaintiff had filed, and the record was accordingly prepared by the clerk in accordance with the plaintiff's designation. The Court said at page 663 of 145 F. 2d:

> "* * * Here defendant, as appellee, does, indeed, complain that he did not know, and was not advised, of the filing of plaintiff's designation with the clerk until after the record had been made up and lodged in this court. He does not, however, invoke our authority under Rule 75, Rules of Civil Procedure, 28 U. S. C. A., following Section 723c, to amend, enlarge, complete, or otherwise correct or supplement the record, and though it does appear that its preparation had been attended by confusion of thought and action, no reason is presented to us, or appears, why we should not consider and decide the appeal on the record as filed, and we do so."

In *Laughlin, et al. v. Berins,* 118 F. 2d 193 (C. A., D. C., 1940), it was held that the Court of Appeals must under the Federal Rules accept the statement of evidence drawn by the plaintiff where the defendant files no objection thereto.

The testimony which appellees attempt to have considered by this Court, *even though it is not included in the Transcript,* is not pertinent to the issues before this Court, inasmuch as it was elicited by appellees in an abortive attempt to obtain a judgment holding appellant Treas-

ure Company to be the *alter ego* of appellant de Bretteville. At page 12 of the Opening Brief of these appellants it is shown that appellees retreated from this attempt during the trial after the trial court had clearly indicated that the question of *alter ego* was not within the issues of the case, as framed by the pleadings.

The judgment below does not hold that appellant Treasure Company is the *alter ego* of appellant de Bretteville, and this question is not before this Court on this appeal.

It should suffice, in answer to the innuendoes of Appellees' Reply Brief, to restate the conclusion of the trial court that "there were no improper charges or withdrawals or misapplication of funds by defendant Treasure Company or by defendant G. de Bretteville during the period covered by said accounting" [Finding II, Tr. p. 102], and also to quote from the trial court's decision that "no funds in which the plaintiffs or any of the other parties to the action have any interest are now in the possession of the defendants or either of them" [Tr. p. 93].

III.

Appellees' Reply Brief Does Not Answer the Argument That the Judgment Below Ignores the Defense of the Statute of Limitations Raised in Appellants' Answer.

At pages 6 and 7 of Appellees' Reply Brief, the argument is made that the statute of limitations has no application to the second cause of action in the second amended and supplemental complaint because the money is owed by appellants as joint adventurers with appellees.

The defense of the statute of limitations was pleaded in Appellants' Answer [Tr. p. 26], but the judgment below

from which this appeal is taken contained no finding of fact nor conclusion of law with respect to the issue of the applicability of the statute of limitations as a defense to *these* appellants.

The judgment below was based upon the theory that $13,000 had been advanced for the completion of Treasure Well No. 8 on an understanding that the advance was to be repaid, and this theory, of course, embraces a loan transaction and not a *trustee and cestui que trust* relationship.

Paragraph V of the second cause of action in the Second Amended and Supplemental Complaint alleges an agreement to repay the advances to appellee Scoville as an oral contract and not a written agreement [Tr. p. 7]. Accordingly, the applicable period of the statute of limitations is two years and not four years. The alleged oral agreement having been made prior to May 15, 1938, is outlawed because the subject lawsuit was not filed until September 10, 1941.

IV.

Appellees' Reply Brief Contains an Attack on Portions of the Judgment Below From Which No Appeal Has Been Brought to This Court.

At pages 8 and 9 of Appellees' Reply Brief the argument is made that this Court should disregard this appeal because the trial court erred in not granting relief to appellees under the *first cause of action* in the second amended and supplemental complaint.

Appellees have brought no appeal to this Court from the judgment of the trial court and it is not proper for them at this time to raise questions with respect to the sufficiency of the judgment below on the first cause of

action of their complaint. The record on this appeal was not prepared with any such argument in view, and it is submitted that this Court should disregard such argument in its entirety.

V.

Appellees' Reply Brief Offers No Answer to the Argument That the Judgment Below Is Not Supported by Appropriate Findings of Contractual Liability or of Admissions of Liability on the Part of These Appellants.

At page 2 of Appellees' Reply Brief, appellees have apparently dismissed all arguments raised in the Opening Brief of appellants de Bretteville and Treasure Company with regard to the insufficiency of the findings which support the judgment below, by quoting from the record the trial court's ruling that findings of fact and conclusions of law were to be prepared by counsel for these appellants.

As officers of the court, counsel for these appellants drafted for the trial court both findings and conclusions in strict accordance with the court's written decision.

Though not included in the record on this appeal, counter-findings and counter-conclusions were thereafter filed on behalf of these appellants but were not adopted by the trial court.

Respectfully submitted,

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Nicholas & Mack,

Attorneys for Appellants G. de Bretteville and Treasure Company.